

Decision 01-10-013 October 10, 2001

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of Alternative Regulatory
Frameworks for Local exchange Carriers.

Investigation 87-11-033
(Filed November 25, 1987)

OPINION ON REQUEST FOR INTERVENOR COMPENSATION

This decision grants The Utility Reform Network (TURN) \$7,469.62 in compensation for its contribution to Decision (D.) 01-02-041.

1. Background

In response to a petition for modification of D.94-06-011 filed by Pacific Bell Telephone Company (Pacific Bell), the Commission issued D.00-02-047. This decision transferred the responsibility for an audit of Pacific Bell (performed as part of the New Regulatory Framework review) from the Commission's Office of Ratepayer Advocates (ORA) to the Commission's Telecommunications Division. TURN and ORA jointly filed an application for rehearing of D.00-02-047. By D.01-02-041, rehearing was granted and D.00-02-047 was vacated. While the responsibility for the audit remained with the Telecommunications Division, the basis articulated for the transfer of responsibility was significantly modified. TURN filed its Request for an Award of Compensation (TURN Request) on April 10, 2001. Pacific Bell filed a response on May 10, 2001. TURN filed a reply to Pacific Bell's response on May 24, 2001.

2. Requirements for Awards of Compensation

Intervenors who seek compensation for their contributions in Commission proceedings must file requests for compensation pursuant to Pub. Util. Code §§ 1801-1812. (All statutory citations are to the Public Utilities Code.) Section 1804(a) requires an intervenor to file a notice of intent (NOI) to claim compensation within 30 days after the prehearing conference or by a date established by the Commission. The NOI must present information regarding the nature and extent of the customer's¹ planned participation and an itemized estimate of the compensation the customer expects to request. The NOI may request a finding of eligibility.

TURN (under its prior name, Toward Utility Rate Normalization) was previously found eligible for compensation in this proceeding. (See D.88-07-035.) TURN has been awarded intervenor compensation for work in earlier phases of this proceeding. (See, e.g., D.91-11-070.)

Other code sections address requests for compensation filed after a Commission decision is issued. Section 1804(c) requires an eligible customer to file a request for an award within 60 days of issuance of a final order or decision by the Commission in the proceeding. TURN timely filed its request for an award of compensation on April 10, 2001, within 60 days after the issuance of the decision regarding which compensation is sought. Under § 1804(c), an intervenor requesting compensation must provide "a detailed description of services and expenditures and a description of the customer's substantial

¹ To be eligible for compensation, an intervenor must be a customer as defined by § 1802(b). In D.98-04-059 (footnote 14) we affirmed our previously articulated interpretation that compensation be proffered only to customers whose participation arises directly from their interests as customers.

contribution to the hearing or proceeding.” Section 1802(h) states that “substantial contribution” means that,

“in the judgment of the commission, the customer’s presentation has substantially assisted the commission in the making of its order or decision because the order or decision has adopted in whole or in part one or more factual contentions, legal contentions, or specific policy or procedural recommendations presented by the customer. Where the customer’s participation has resulted in a substantial contribution, even if the decision adopts that customer’s contention or recommendations only in part, the commission may award the customer compensation for all reasonable advocate’s fees, reasonable expert fees, and other reasonable costs incurred by the customer in preparing or presenting that contention or recommendation.”

Section 1804(e) requires the Commission to issue a decision that determines whether the customer has made a substantial contribution and what amount of compensation to award. The level of compensation must take into account the market rate paid to people with comparable training and experience who offer similar services, consistent with § 1806.

3. Eligibility to Claim Compensation

As noted above, TURN was previously found to be eligible for compensation in this proceeding by D.88-07-035. Pursuant to Rule 76.76, a customer found eligible for an award of compensation in one phase of a proceeding remains eligible in later phases.

4. Substantial Contribution to Resolution of Issues

A party may make a substantial contribution to a decision in one of several ways.² It may offer a factual or legal contention upon which the Commission

² Section 1802(h).

relied in making a decision,³ or it may advance a specific policy or procedural recommendation that the Administrative Law Judge or Commission adopted.⁴ A substantial contribution includes evidence or argument that supports part of the decision even if the Commission does not adopt a party's position in total.⁵

TURN notes, correctly, that the subject matter of D.01-02-041 is extremely limited. The major substantive issues of this proceeding, of which there were a great many, were resolved in several prior decisions. The issue being addressed by D.01-02-041 was whether error had been committed in the prior decision in which the Commission reassigned the NRF audit responsibility from ORA to the Telecommunications Division. TURN contends that the prior decision in which the reassignment was made, D.00-02-047, was largely based on findings and conclusions associated with the purported appearance of bias on the part of ORA. TURN notes that TURN and ORA filed a joint application for rehearing of D.00-02-047, arguing in large part that there was inadequate record evidence in support of the appearance of bias findings and conclusions. TURN contends the Commission agreed with those arguments and, as a result, vacated D.00-02-047. (TURN Request at 3.)

TURN states that the risk of such language regarding bias remaining in a Commission decision was that other parties in other proceedings in the future

³ *Id.*

⁴ *Id.*

⁵ The Commission has provided compensation even when the position advanced by the intervenor is rejected. D.89-03-063 (awarding San Luis Obispo Mothers For Peace and Rochelle Becker compensation in Diablo Canyon Rate Case because their arguments, while ultimately unsuccessful, forced the utility to thoroughly document the safety issues involved).

might cite such a decision to discredit ORA. They contend that although the issue of which Commission unit was doing the audit remained unchanged by the grant of rehearing and vacation of D.00-02-047, the removal of the language discussing an appearance of bias associated with ORA was of substantial benefit. (*Id.* at 3-4.)

Pacific Bell challenges TURN's assertion of substantial benefit. Pacific Bell says that in making changes to D.00-02-047, "[t]he Rehearing Decision specifically rejected the ORA/TURN 'due process' argument, and it did not discuss at all the ORA/TURN 'evidentiary record' argument" (i.e., the absence of an evidentiary record for the finding of an appearance of bias). (Pacific Bell Response at 2.)

As TURN notes in its Reply to the Pacific Bell Response, Pacific Bell is in error. On the first page of D.01-02-041 we stated: "The Commission concludes that there was no due process violation, but that ORA's and TURN's argument has merit with respect to the legal adequacy of the record evidence described in D.00-02-047 regarding an appearance of bias." Thus, the decision expressly relied on one of TURN's arguments, and we concur that TURN made a substantial contribution to D.01-02-041.

Pacific Bell also takes issue with two other aspects of the TURN Request, both of which go to the size of the request.

First, Pacific Bell contends that even if the ORA/TURN application for rehearing made a contribution to the rehearing decision, there is no evidence that TURN added anything to the effort. Pacific Bell notes the TURN acknowledgement that there was substantial overlap of TURN with the work of ORA and suggests that the application for rehearing was drafted by ORA and TURN merely joined in. (Pacific Bell Response at 2.)

TURN responds by noting that they acknowledged overlap with ORA but that Pacific Bell neglected TURN's verified assertion that reasonable steps were taken to avoid duplication and, where there was some degree of overlap, the work of ORA and TURN served to complement each other. As TURN correctly points out, § 1802.5 permits such related work. It states: "Participation by a customer that materially supplements, complements, or contributes to the presentation of another party, including the commission staff, may be fully eligible for compensation if the participation makes a substantial contribution to a commission order or decision, consistent with Section 1801.3."

Finally, Pacific Bell contends that the claimed hours are excessive in that they include work in a time period that preceded the efforts related to the application for rehearing of D.01-02-041. (Pacific Bell Response at 2.)

TURN replies that it should be permitted to claim compensation on the efforts leading up to the decision on which rehearing was sought. TURN contends that its efforts in dealing with the consideration of Pacific Bell's petition for modification leading up to D.00-02-047 focused primarily on the "appearance of bias" language that appeared in the Alternate Decision of Commissioner Duque. TURN states that if that language had not been adopted and that standard not set, they would not have sought rehearing of D.00-02-047 and would instead have pursued their compensation request for those efforts immediately following the issuance of D.00-02-047.

TURN's request for work related to D.00-02-047 is timely. Pursuant to § 1804(c) a request for an award of compensation must be filed within 60 days "[f]ollowing issuance of a final order or decision by the commission in the hearing or proceeding. . . . " Pursuant to Rule 76.72 of the Commission's Rules of Practice and Procedure: "If an application for rehearing challenges a decision on an issue on which the customer believes it made a substantial contribution, the

“final order or decision” on that issue means the order or decision denying rehearing on that issue, the order or decision that resolves that issue after rehearing, or the order or decision closing the proceeding.” The logic of this requirement is obvious since, absent resolution of any application for rehearing filed within the otherwise applicable 60-day period, it would be inconclusive as to whether a substantial contribution would be demonstrable or sustainable.

5. The Reasonableness of Requested Compensation

TURN requests compensation in the amount of \$7,469.62 as follows:

Attorney Fees			
Name	Hours	Rate/ Hour	Totals
Thomas Long	4.5	\$280	\$1,260.00
	15.25	\$300	\$4,575.00
Robert Finkelstein	7.0	\$140	\$ 980.00
		SUBTOTAL	\$6,815.00
Other Costs			
Photocopying expense @ \$0.20/page			\$ 461.00
Postage cost			\$ 87.90
Lexis expense			\$ 105.72
		SUBTOTAL	\$ 654.62
		TOTAL	\$7,469.62

Overall Benefits of Participation

In D.98-04-059, the Commission adopted a requirement that a customer must demonstrate that its participation was “productive,” as that term is used in § 1801.3, where the Legislature gave the Commission guidance on program administration. (See D.98-04-059, mimeo. at 31-33, and Finding of Fact 42). In that decision we discuss the requirement that participation must be productive in

the sense that the costs of participation should bear a reasonable relationship to the benefits realized through such participation. Customers are directed to demonstrate productivity by assigning a reasonable dollar value to the benefits of their participation to ratepayers.

In this request TURN contends that it is nearly impossible to assign a dollar value to the benefits of vacating a Commission decision that established an inappropriate “appearance of bias standard.” TURN correctly asserts that the Commission has in the past awarded compensation for assistance in record development where assignment of a specific dollar value is difficult. We further note that who conducts utility audits is a question the Commission has had to consider on several occasions. The importance of the issue further confirms that TURN appropriately devoted significant resources to resolve it.

We find that the participation of TURN was beneficial and that the nature of the benefit exceeded the compensation requested.

Hours Claimed

TURN provided a daily listing of the specific tasks performed by Long and Finkelstein in connection with this proceeding. TURN contends that its involvement was extremely efficient, not beginning its involvement in consideration of Pacific Bell’s petition for modification of D.94-06-011 until the issuance of the draft decision articulating the “appearance of bias” standard. TURN notes that the work on the earlier draft decision was the base from which it worked in the application for rehearing of D.01-02-041.

TURN also requests that it be relieved from the normal requirement to allocate hours by issue since the activity underlying the current request pertained to only one issue, the “appearance of bias” standard of D.00-02-047. We concur that no allocation by issue should be required with respect to the

current claim and we find that the hours claimed by TURN are reasonable for the efforts involved.⁶

Hourly Rates

TURN seeks compensation for work performed by Thomas Long at the rates of \$280 for work performed in 1999 and \$300 for work performed in 2000. TURN notes that at the time of filing this present request for compensation it had pending other requests seeking comparable compensation rates. In fact, in D.01-07-020, we found these rates appropriate for the time periods in question. Therefore, we find the rates requested for Long to be reasonable.

TURN requests an hourly rate of \$140 for the work performed by Finkelstein in preparing this request for compensation. Consistent with our practice regarding time spent preparing compensation requests, this rate represents one-half of his usual hourly rate, here based upon that previously approved in D.00-11-002 for Finkelstein for work during 2000. TURN is willing to accept this same compensation level for the work done in 2001 for this compensation request but notes that in so doing it does not waive its right to seek a higher hourly rate for Finkelstein's work in 2001 in another proceeding.

We find that TURN's requested hourly rates are reasonable.

Other Costs

TURN contends that the \$654.52 requested for copying and postage and a small amount of on-line legal research are reasonable. As indicated in the

⁶ We note that Finkelstein's time preparing the compensation request (7 hours) might appear high considering that TURN claims only 26.75 hours overall. However, TURN had to review timesheets over widely separated periods, and also responded to Pacific Bell's opposition to the request. In light of these circumstances, Finkelstein's claimed hours are reasonable.

details of the request appendix, the bulk of these dollars were for the copying and mailing of the pleadings and other documents and correspondence required for TURN's participation in this proceeding. We find the cost claimed to be reasonable.

6. Award

We award TURN \$7,469.62 calculated as described above.

Consistent with previous Commission decisions, we will order that interest be paid on the award amount (calculated at the three-month commercial paper rate), commencing June 24, 2001 (the 75th day after TURN filed its compensation request) and continuing until Pacific Bell makes its full payment of award.

As in all intervenor compensation decisions, we put TURN on notice that the Commission Staff may audit TURN's records related to this award. Thus, TURN must retain adequate accounting and other documentation to support all claims for intervenor compensation.

Waiver of Comment Period

Since this is a decision to determine intervenor compensation to be awarded pursuant to § 1801, the time for comments may be reduced or waived by the Commission pursuant to Rule 77.7(f)(6) of the Commission's Rules of Practice and Procedure. Because this decision only determines compensation to be awarded and the parties have already had a full and fair opportunity to present their view on this limited issue, we will waive the time for comments.

Findings of Fact

1. TURN has made a timely request for compensation for its contribution to D.01-02-041.

2. TURN was previously found eligible for compensation in this proceeding in D.88-07-035.

3. TURN contributed substantially to D.01-02-041.

4. TURN's participation was productive in that the costs it claims for its participation were less than the benefits realized.

5. TURN has requested hourly rates for attorneys and experts that are no greater than the market rates for individuals with comparable training and experience and have been previously approved by this Commission.

6. The hours claimed and miscellaneous costs incurred by TURN are reasonable.

Conclusions of Law

1. TURN has fulfilled the requirements of §§ 1801-1812 which govern awards of intervenor compensation.

2. TURN should be awarded \$7,469.62 for its contribution to D.01-02-041.

3. Per Rule 77.7(f)(6) of the Commission's Rules of Practice and Procedure, the comment period for this compensation decision may be waived.

4. This order should be effective today so that TURN may be compensated without unnecessary delay.

O R D E R

IT IS ORDERED that:

1. The Utility Reform Network (TURN) is awarded \$7,469.62 in compensation for its substantial contribution to Decision 01-02-041.

2. Pacific Bell Telephone Company (Pacific Bell) shall pay TURN the amount awarded within 30 days of the effective date of this order. Pacific Bell shall also pay interest on the award at the rate earned on prime, three-month commercial

paper, as reported in Federal Reserve Statistical Release G.13, with interest, beginning June 24, 2001 and continuing until full payment is made.

3. The comment period for today's decision is waived.

4. This proceeding is closed.

This order is effective today.

Dated October 10, 2001, at San Francisco, California.

LORETTA M. LYNCH

President

HENRY M. DUQUE

RICHARD A. BILAS

CARL W. WOOD

GEOFFREY F. BROWN

Commissioners